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**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6600

Case No. S-2494

PETITION OF OMNIPOINT COMMUNICATIONS CAP OPERATIONS, LLC

AND

RAHIM TOFIGH

(Hearing held March 13, 2002)

OPINION OF THE BOARD

(Effective Date of Opinion: May 30, 2002)

Case No. S-2494 is the petition of Omnipoint Communications CAP Operations, LLC ("Petitioner") and Rahim Tofigh for a special exception, pursuant to Section 59-G-2.43 of the Zoning Ordinance, permitting the placement of communications antennas and related equipment on the roof of a building located at 14301 Layhill Road.

Pursuant to Section 59-A-4.11(a) of the Zoning Ordinance, the Board of Appeals (the "Board") held a public hearing on March 13, 2002, during which evidence was submitted to the Board in support of the petition. There was no evidence or testimony in opposition to this petition.

Karl J. Nelson, Esquire, appeared on behalf of the Petitioner. Martin Klauber, Esquire, People's Counsel of Montgomery County, also appeared.

The subject property is Part of Parcel A (N684), located at 14301 Layhill Road, Silver Spring, Maryland, in the O-M Zone, (Tax Account No. 02096075).

Decision of the Board: Requested Special Exception **granted**,
subject to conditions enumerated below.

EVIDENCE PRESENTED TO THE BOARD

1. Petitioner applied for a special exception for the construction, operation, and maintenance of an unmanned telecommunications facility to be located on the roof of the building located at 14301 Layhill Road, Parcel N684, Aspen Hill. The property is zoned O-M (office building-moderate density).
2. Mr. Rahim Tofigh is the owner of the subject building and a Co-Petitioner on this petition. Petitioner leases space on the rooftop of the building for its proposed telecommunications equipment. (Exhibit No. 8 – Rooftop Lease with Option;

Exhibit No. 27 – Letter to Board from Rahim Tofigh dated March 7, 2002, requesting to be Co-Petitioner).

3. The subject building is approximately 25 feet in height with a penthouse on the roof. Petitioner proposes to construct a faux brick wall extending 8' 6" above the existing penthouse and mount 6 panel antennas flush with the top of the extended wall. The installation will extend 43 feet above the ground and the antennas will be 5 feet long. Petitioner also proposes to install a platform inside the enclosure to accommodate two equipment cabinets. The antennas will extend approximately 24 inches above the faux brick wall to ensure that there is no interference between those antennas and the antennas to be placed at a lower height on the same building by another telecommunications carrier (Transcript of March 13, 2002 Board of Appeals Hearing ("Hearing Transcript") at 4; Exhibit 25 – Letter dated March 5, 2002 from M-NCPPC ("Commission Letter") at 3).
4. The proposed facility will serve an area approximately one mile in radius in the vicinity of Layhill Road and Bonifant/Bel Pre Road (Exhibit 10 – 8-17-01 memorandum from Robert Hunnicutt, Tower Coordinator ("Hunnicutt Memorandum"); Exhibits 11(a)–(c) – Coverage with and without Proposed Facility).
5. The proposed facility will generate no noise, fumes, odors or dust. It will not be illuminated. The radio frequency emissions that the antennas generate will comply with all Federal Communications Commission requirements (Exhibit 19(c) – Revised Statement of Justification; Exhibit 24 – M-NCPPC Technical Staff Report of March 5, 2002 ("Staff Report") at 3).
6. A platform will be built inside the enclosed faux brick wall and will contain two equipment cabinets. The equipment cabinets will be approximately 64 inches by 51 inches. The cabinets also will be unmanned (Exhibit 19(c) – Revised Statement of Justification; Exhibit 24 – Staff Report at 3).
7. Petitioner's antennas will be painted so as to camouflage them against the backdrop of the faux brick wall (Exhibit 24 – Staff Report at 3).
8. The Tower Committee issued a favorable recommendation for this proposed facility on August 15, 2001 (Exhibit 10 – Hunnicutt Memorandum).
9. The Planning Board recommended approval of this Petition subject to conditions (Exhibit 25 – Commission Letter).
10. The proposed use will not generate any traffic other than occasional routine maintenance visits, which will occur approximately once a month (Exhibit 19(c) – Revised Statement of Justification at 2; Exhibit 24 - Staff Report at 3).

11. As the installation will be entirely on the roof of a building, no additional landscaping is proposed. The building is not a historic structure (Exhibit 19(c) – Revised Statement of Justification at 2).
12. The subject property is covered by the Aspen Hill Master Plan (Exhibit 19(c) – Revised Statement of Justification at 3).
13. Petitioner intends to mount a warning sign, not to exceed two square feet, on the proposed installation. The sign would identify the Petitioner and provide contact information for emergencies, as required by the FCC (Exhibit 19(c) – Revised Statement of Justification at 5; Exhibit 24 – Staff Report at 8).

FINDINGS OF THE BOARD

GENERAL CONDITIONS (SECTION 59-G-1.2.1)

The proposed special exception meets the general conditions set forth in Sections 59-G-1.2.1 and 59-G-1.21, specifically:

Section 59-G-1.2.1 sets forth the standards which the Board must use to evaluate a special exception. That standard requires that a special exception be evaluated based on its inherent adverse effects at the particular location proposed, irrespective of adverse effect elsewhere established in the zone (Zoning Text Amendment No. 99004, Opinion, page 4). Section 59-G-1.2.1 states:

Sec. 59-G-1.2. Conditions for Granting

59-G-1.2.1. Standard for evaluation. *A special exception must not be granted absent the findings required by this Article. In making these findings, the Board of Appeals, Hearing Examiner, or District Council, as the case may be, must consider the inherent and non-inherent adverse effects of the use on nearby properties and the general neighborhood at the proposed location, irrespective of adverse effects this use might have if established elsewhere in the zone. Inherent adverse effects are the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations. Inherent adverse effects alone are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site. Non-inherent adverse effects, alone or in conjunction with the inherent effects, are a sufficient basis to deny a special exception.*

The Board interprets this section to require the following analysis. The Board must:

- (1) Make a determination as to the general neighborhood affected by the proposed use.
- (2) Establish those inherent, generic physical and operational characteristics arising from the given use, in this case a telecommunications facility, and to create an evaluation standard. This evaluation standard does not include the actual physical size and scale of operation of the use proposed.
- (3) Determine separately the physical and operational characteristics of the particular use proposed, in this case the telecommunications facility as proposed by the Applicant.
- (4) Compare the generic characteristics of the evaluation standard with the particular characteristics of the use proposed. Inherent adverse effects are those characteristics of the proposed use consistent with the characteristics of the evaluation standard. Non-inherent adverse effects are those characteristics found in the use proposed that are not found in the evaluation standard.

Applying the above analysis to this case, the Board finds as follows:

(1) The General Neighborhood

The Board finds that the neighborhood affected by the proposed use consists of the properties located immediately north and east of the subject site which are zoned RT-15, and are developed with townhouse units. Also included are the properties across Bonifant Road and directly south of the site, which are zoned C-T (Commercial Transitional) and R-60 and are developed with the Sandy Spring National Bank and low-density residential uses, respectively; the property across Layhill Road and west of the site, which is zoned C-1 and developed with the Layhill Shopping Center and the Plaza del Mercado; and the southwest quadrant of Layhill Road and Bonifant Road which is zoned PD-7 and developed as the Parker Farm townhouse community.

(2) Evaluation Standard – Physical and Operational Characteristics

The Board recognizes and adopts the Planning Board staff's recommendation of seven criteria to establish the physical and operational characteristics of a use. Those are size, scale, scope, lighting, noise, traffic, and the environment. The Board finds that the primary physical characteristic necessarily associated with a telecommunications facility is the facility's height, which may reach 150 feet. These facilities tend to be visually obtrusive given the difficulty in mitigating the impact of the structure required to hold antennae needed for operational use. The Board finds that there are minimal

noise, traffic, and environmental issues relating to such facilities although they are accompanied by equipment buildings and related evergreen or other screening to mitigate the impact of ground level. There are generally no lighting impacts associated with this type of use.

(3) Proposed Use – Physical and Operational Characteristics

In this case, the height of the proposed use does not pose an issue as installation of a free standing monopole is not proposed, but rather the installation of antennas on a faux brick wall on top of an existing building. There will be minimal visual impact as the antennas will be mounted and painted so as to reduce their visibility. The faux brick wall will hide the equipment cabinets. There is no environmental impact, no issue relating to noise, and no lighting is proposed. Any traffic will be occasional routine maintenance visits once or twice per month, and any activity will generally be restricted to the building rooftop.

(4) Comparison of characteristics

After considering the generic characteristics of a telecommunications facility, and comparing them with the physical and operational characteristics of the Petitioner's proposed use, the Board finds that all of the physical and operational characteristics of the proposed use will be inherent adverse effects.

59-G-1.21. General conditions.

(a) *A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) *Is permissible with a special exception in the O-M zone.*

Under Section 59-C-4.2 of the Zoning Ordinance, telecommunications facilities are permitted in an O-M zone by special exception.

(2) *Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

The proposed use complies with all the standards and requirements for a telecommunications facility under Section 59-G.2.43 of the Zoning Ordinance. The subject property on which the facility would be located is an office building in an O-M zone. The only impact of the facility is visual, an inherent impact in the use. The antennas will be mounted on faux brick

walls and painted in such a way as to reduce their visibility. The equipment cabinets will be enclosed in the faux brick walls. There are several utility poles with wires in the vicinity, some of which are as high or higher than the proposed facility. (Exhibit 24 – Staff Report at 9; Exhibit 19(c) – Revised Statement of Justification; Exhibits 28(a) and (b) – Photographs of Proposed Facility and Existing Structure; Hearing Transcript at 6-7).

- (3) *Will be consistent with the general plan for the physical development of the District, including any master plan thereof adopted by the Commission. Any decision to grant or deny special exception must be consistent with a recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that the granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

The subject property is located in the planning area covered by the Aspen Hill Master Plan. The Master Plan supports the existing O-M zone for the property and telecommunication facilities are allowed by special exception in that zone (Exhibit 24 – Staff Report at 9; see also Exhibit 19(c) – Revised Statement of Justification at 3).

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions and number of similar uses.*

The proposed use will be harmony with the general character of the neighborhood when considering these criteria (Exhibit 24 – Staff Report at 9; see also Exhibit 19(c) – Revised Statement of Justification at 4).

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site irrespective of any adverse effects the use might have if established elsewhere in the zone.*

The proposed use will not have a detrimental effect for any of these reasons (Exhibit 24 – Staff Report at 10; see also Exhibit 19(c) – Revised Statement of Justification at 4).

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of*

any adverse effects the use might have if established elsewhere in the zone.

The requested use will not cause adverse effects with respect to any of these criteria (Exhibit 24 – Staff Report at 10; see also Exhibit 19(c) – Revised Statement of Justification at 4).

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

The proposed use will not increase the number, intensity, and scope of the approved special exceptions in the area (Exhibit 24 – Staff Report at 10; see also Exhibit 19(c) – Revised Statement of Justification at 4).

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective on any adverse effects the use might have if established elsewhere in the zone.*

The proposed special exception will not cause any of these effects (Exhibit 24 – Staff Report at 10; see also Exhibit 19(c) – Revised Statement of Justification at 4).

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

The subject property is served by adequate public facilities (Exhibit 24 – Staff Report at 10; see also Exhibit 19(c) – Revised Statement of Justification at 5).

- (i) *If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception.*

The site has been subdivided, thus a preliminary plan of subdivision is not needed (Exhibit 24 – Staff Report at 11).

- (ii) *With regard to findings relating to public roads, the Board, the Hearing Examiner or the District Council, as the case may be, must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.*

The proposed facility is unmanned, and will have an average of two vehicular trips per month or less for equipment maintenance. There will be no detrimental effect on the safety of vehicular or pedestrian traffic (Exhibit 24 – Staff Report at 11; see also Exhibit 19(c) – Revised Statement of Justification at 2).

SPECIFIC CONDITIONS (SECTION 59-G-2.43)

The proposed special exception also meets the specific conditions set forth in Section 59-G-2.43, specifically:

Sec. 59-G-2.43. Public utility buildings, public utility structures, and telecommunication facilities.

- (a) *A public utility building or public utility structure, not otherwise permitted, may be allowed by special exception. The findings of this subsection (a) do not apply to electric power transmission or distribution lines carrying in excess of 69,000 volts, which are regulated by subsection (f) below. For other buildings or structures regulated by this section, the Board must make the following findings:*

- (1) *The proposed building or structure at the location selected is necessary for public convenience and service.*

The proposed facility in this location is necessary for public convenience and service. Petitioner's coverage maps show the inadequacy of Petitioner's present coverage in the area without the proposed facility and the improved coverage that the facility would provide (Exhibit 24 - Staff Report at 5; Exhibit 10 – Hunnicutt Memorandum; Hearing Transcript at 12-13; Exhibits 11(a)-(c) – Coverage With and Without Facility; Exhibit 19(c) – Revised Statement of Justification at 1; Hearing Transcript at 12-13).

- (2) *The proposed building or structure at the location selected will not endanger the health and safety of workers and residents in the community and will not substantially impair or prove detrimental to neighboring properties.*

The proposed facility will not substantially impair or prove detrimental to the neighboring properties nor will it endanger the health and safety of residents or workers in the community (Exhibit 24 – Staff Report at 5).

- (b) *Public utility buildings in any permitted residential zone, shall, whenever practicable, have the exterior appearance of residential buildings and shall have suitable landscaping, screen planing and fencing, wherever deemed necessary by the Board.*

Not applicable because the subject property is located in the O-M zone.

- (c) *Reserved.*
- (d) *Any proposed broadcasting tower shall have a setback of one foot from all property lines for every foot of height of the tower; provided, that any broadcasting tower lawfully existing on September 1, 1970, shall be exempt from the setback limitations imposed by this subsection, and may be continued, structurally altered, reconstructed or enlarged; provided further, that no structural change, repair, addition, alteration or reconstruction shall result in increasing the height of such tower above the then existing structurally designed height.*

Not applicable.

- (e) *Examples of public utility buildings and structures for which special exceptions are required under this section are buildings and structures for the occupancy, use, support or housing of switching equipment, regulators, stationary transformers and other such devices for supplying electric service; telephone offices; railroad, bus, trolley, air and boat passengers stations; radio or television transmitter towers and stations; telecommunication facilities; above ground pipelines. Additional standards for telecommunication facilities are found in subsection (j).*

The subject petition is a special exception use as defined in this subsection.

- (f) *The provisions of section 59-G-1.21(a) shall not apply to this subsection. In any residential zone, overhead electrical power and energy transmission and distribution lines carrying in excess of 69,000 volts, where the Board finds the presence of four factors.*

Not applicable.

- (g) *In addition to the authority granted by section 59-G-1.22, the Board may attach to any grant of a special exception under this section other*

conditions that it may deem necessary to protect the public health, safety or general welfare.

This special exception approval is subject to the conditions adopted herein.

- (h) *Petitions for special exception under this section may be filed on project basis.*

Not applicable.

- (i) *A petitioner under this section shall be considered an interested person for purposes of filing a request for a special exception if he states in writing under oath that he has made a bona fide effort to obtain a contractual interest in the subject property for a valid consideration without success, and that he intends to continue negotiations to obtain the required interest or in the alternative to file condemnation proceedings should the special exceptions be granted.*

Not applicable.

- (j) *Any telecommunications facility must satisfy the following standards:*

- (1) *The minimum parcel or lot area must be sufficient to accommodate the location requirements for the support structure under paragraph (2), excluding the antenna(s), but not less than the lot area required in the zone. The location requirement is measured from the base of the support structure to the property line. The Board of Appeals may reduce the location requirement to not less the building setback of the applicable zone if the applicant requests a reduction and evidence indicates that a support structure can be located on the property in a less visually obstrusive location after considering the height of the structure, topography, existing vegetation, adjoining and nearby residential properties, if any, and visibility from the street.*

The size of the subject parcel is 23,987 square feet. The Zoning Ordinance sets forth no minimum lot or parcel size for the O-M zone and the property owner is a Co-Petitioner. Therefore, this special exception attaches to the entirety of the subject parcel, which is sufficient to accommodate the location requirements for the proposed placement of Petitioner's antennas on a faux brick wall extending 8' 6" above the existing penthouse.

- (2) *A support structure must be located as follows:*

- a. *In agricultural and residential zones, a distance of one foot from property line for every foot of height of the support structure.*

Not applicable.

- b. *In commercial and industrial zones, a distance of one-half foot from property line for every foot of height of the support structure from a property line separating the subject site from commercial or industrial zoned properties, and one foot for every foot of height of the support structure from residential or agricultural zoned properties.*

The extended penthouse wall of the existing office building serves as the support structure, and the building continues to meet the setback standards for the O-M zone.

- c. *These location requirements apply to perimeter lot lines and not to interior lot lines.*

These location requirements apply to perimeter lots lines not interior lot lines.

- (3) *A freestanding support structure must be constructed to hold not [fewer] than 3 telecommunication carriers. The Board may approve a support structure holding [fewer] than 3 telecommunication carriers if:*

- a. *requested by the applicant and a determination is made that collocation at the site is not essential to the public interest; and*
- b. *the Board decides that construction of a lower support structure with fewer telecommunication carriers will promote community compatibility.*

Not applicable because no new freestanding structure is being proposed. Petitioner will install its antennas on an extension of the existing penthouse.

- (4) *No signs or illumination are permitted in the antennas or support structure unless required by the Federal Communications Commission, the Federal Aviation Administration, or the County.*

No illumination will be used for the proposed facility. The Petitioner has stated that a warning sign not to exceed 2 square feet will be installed. It will also identify the applicant and provide contact information for emergencies as required by the FCC (Exhibit 24 – Staff Report at 8).

- (5) *Every freestanding support structure must be removed at the cost of the applicant when the telecommunication facility is no longer in use by any telecommunication carrier.*

Removal of the Petitioner's telecommunications equipment when no longer in use is a condition of this approval.

The Board hereby grants the special exception for the proposed telecommunications facility, subject to the following conditions:

1. The Petitioner shall be bound by all of its testimony and exhibits of record and the testimony of its witnesses, to the extent that such testimony and representations are identified in the Board's opinion granting the Special Exception.
2. The telecommunications facility must be removed at the cost of the Petitioner when the facility is no longer in use by the telecommunication carrier.
3. The Petitioner's sign must comply with all applicable Montgomery County sign ordinances and any other applicable laws, rules and regulations.
4. The Petitioner must obtain administrative approval by the Technical Staff of M-NCPPC of a site plan amendment prior to the issuance of permits.

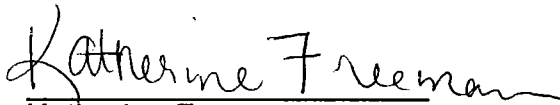
On motion by Donna L. Barron, seconded by Louise L. Mayer, with Angelo M. Caputo, Allison Ishihara Fultz and Donald H. Spence, Jr., Chairman, in agreement, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled case.



Donald H. Spence, Jr.
Chairman, Montgomery County Board of Appeals

I do hereby certify that the foregoing Opinion was officially entered in the Opinion Book of the County Board of Appeals this 30th day of May, 2002.

A handwritten signature in cursive script that reads "Katherine Freeman". The signature is written in dark ink and is positioned above the printed name and title.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure.

See Section 59-A-4.53 of the Zoning Ordinance regarding the twenty-four month period within which the special exception granted by the Board must be exercised.

See Section 59-A-3.2 of the Zoning Ordinance regarding Use and Occupancy Permit for a Special Exception.

